APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 91-5854, 92-4355

MANNIE CHAPMAN, JIMMIE ERSKINE, DOROTHY REID, JAMES L. WOODALL, R.P. VINALL, and DIANE L. RAGONE,

Plaintiffs-Appellees,

v.

HERMAN M. KLEMICK, HERMAN M. KLEMICK, P.A., a Florida Professional Association,

Defendants-Appellants.

MANNIE CHAPMAN, JIMMIE ERSKINE, DOROTHY REID, JAMES L. WOODALL, R.P. VINALL, and DIANE L. RAGONE,

Plaintiffs-Appellees, Cross-Appellants,

v.

HERMAN M. KLEMICK, HERMAN M. KLEMICK, P.A., a Florida Professional Association,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Oct. 12, 1993

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

CARNES, Circuit Judge:

This case arises under the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §§ 1001-1461. The issue presented is whether an attorney who represents a beneficiary of a trust fund in the beneficiary's separate personal injury action becomes a fiduciary under ERISA when, in settlement of his client's personal injury claim, the attorney receives funds to which the trust fund asserts subrogation rights. The district court held that the attorney became an ERISA fiduciary when he received such funds, and that he breached his fiduciary duty to the trust fund by disposing of those funds in a manner inconsistent with the subrogation agreement his client had signed. Because we do not think that ERISA's reach extends this far, we reverse. Our reversal of the district court's decision imposing liability on Klemick renders the Trust Fund's cross appeal for an increase in the damages award moot.

BACKGROUND

The facts were stipulated by the parties in the district court. *Chapman v. Klemick,* 750 F.Supp. 520, 521-22 (S.D.Fla.1990). Briefly, Frank Wilson, Jr., a beneficiary of the Laborers Health and Welfare Trust Fund of South Florida ("Trust Fund") suffered personal injuries as a result of a motorcycle accident and retained the professional services of Herman Klemick, a lawyer, to assist him in recovering compensation from the tortfeasor's insurance carrier. Wilson incurred approximately $28,000.00 in medical expenses, which he sought to have the Trust Fund pay. Prior to releasing the funds, however, the Trust Fund requested that he sign a subrogation agreement stating that the Trust Fund would be reimbursed should he recover any compensation for his injuries by suit, settlement, or otherwise. After consulting Klemick by telephone, Wilson signed the agreement.

Following negotiations with the tortfeasor's insurance carrier, Klemick received a check for $25,000.00 made out jointly to him and Wilson. Klemick asked the Trust Fund to waive its right to subrogation, but the Trust Fund declined. Klemick stated to the Trust Fund that he would never recommend that his client voluntarily turn over all the settlement funds that he had recovered, and indicated that he had conceived of a plan by which, even if the Trust Fund sued Wilson and obtained a judgment against him for the amount of money recovered in the settlement, the Trust Fund would be frustrated in its attempts to collect.

A few days after his conversation with the Trust Fund, Klemick and Wilson endorsed the check. Klemick deposited the entire amount in the Herman M. Klemick, P.A. Trust Account, and made out a check to Wilson for $15,431.50. Klemick then paid himself $8,333.00 as his attorney's fee and applied the balance to offset costs.

Ten days later, the Trust Fund filed a complaint and application for a temporary restraining order to enjoin Wilson from spending the funds. In an emergency hearing on that application, Wilson informed the district court that he had already spent all of the money. The Trust Fund obtained a judgment against Wilson for the full amount of the settlement plus $21,659.00 in attorney's fees. *See Pugh v. Wilson,* 693 F.Supp. 1096 (S.D.Fla. 1988). The validity of that judgment against Wilson is not at issue in this case, but Wilson's assets were insufficient to satisfy the judgment against him. The Trust Fund then sued Klemick, alleging that he had become an ERISA fiduciary because Wilson's insurance settlement became "Trust Fund assets" by operation of the subrogation agreement, and that Klemick had breached his fiduciary duty to the Trust Fund by retaining a portion of the settlement as his attorney's fee and allowing Wilson to spend his portion.

The case came before the district court on cross-motions for summary judgment. The district court

granted the Trust Fund's motion and denied Klemick's, finding Klemick liable for breach of fiduciary duty under ERISA. Klemick has appealed to this Court. We review the district court's grant of summary judgment de novo. *Useden v. Acker,* 947 F.2d 1563, 1572 (11th Cir. 1991), *cert. denied* —— U.S. ——, 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993).

DISCUSSION

We look first to the statutory definition of "fiduciary" under ERISA. 29 U.S.C. § 1002(21)(A) provides in pertinent part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The district court held that the subrogation agreement rendered the settlement proceeds "Trust Fund assets," and that Klemick had exercised control over those assets, therefore, Klemick was a fiduciary of the Trust Fund. The court said: "[W]hen Klemick decided how to allocate the monies from the settlement check . . . he exerted what is obviously 'any . . . discretionary control respecting . . . disposition of [Trust Fund] assets.' " *Chapman,* 750 F.Supp. at 522-23. We must decide whether the district court's conclusion that Klemick was a fiduciary is correct.

As an initial matter, we are not persuaded that the $25,000.00 received by Wilson in settlement of his tort claim constituted "Trust Fund assets." At the time Kle-

mick disbursed those funds, what the Trust Fund had by virtue of its agreement with Wilson was a contractual "claim" for reimbursement of the $28,000.00 in medical expenses it had paid on behalf of Wilson. That did not automatically convert the $25,000.00 settlement which Klemick disbursed into assets of the Trust Fund. Nonetheless, we need not rely solely on the characterization of those funds for our conclusion, because a functional analysis of Klemick's status also leads to the conclusion that he was not acting as a fiduciary of the Trust Fund for purposes of ERISA. *See Useden v. Acker*, 947 F.2d 1563, 1577 (11th Cir.1991) (applying the "functional definition of fiduciary status enshrined in ERISA"), *cert. denied*, —— U.S. ——, 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993).

We are aware of no case in which a lawyer for an ERISA plan *beneficiary*, as opposed to a lawyer for an ERISA *plan*, has been alleged to be an ERISA fiduciary. The closest authority we find for guidance is *Useden v. Acker*, which we decided after the district court entered summary judgment in this case. In *Useden*, a trust fund sought to impose fiduciary liability on a bank which had acted upon collateral pledged by the fund when the fund failed to perform under a loan agreement with the bank. The fund also sought to impose fiduciary liability on a law firm that had rendered legal and business advice to the fund's managers. We found that neither was an ERISA fiduciary.

The trust fund in *Useden* argued that the bank became a fiduciary under § 1002(21)(A) when it exercised "discretionary authority or discretionary control" over trust fund assets. We held that the bank was not a fiduciary within the meaning of ERISA, observing that "the discretionary role needed to support fiduciary status must amount to more than a theoretical contrivance." *Useden*, 947 F.2d at 1574. The terms of the loan agreement, which were typical of arm's length commercial loan

agreements, did not confer fiduciary status on the bank: "An entity which assumes discretionary authority or control over plan assets will not be considered a fiduciary if that discretion is sufficiently limited by a pre-existing framework of policies, practices and procedures," such as rules governing when a bank may act on collateral in the event of non-performance on a commercial loan. *Id.* at 1575. Furthermore, we noted that the bank's "duty to its own shareholders and depositors" could conflict with a fiduciary duty to an ERISA plan borrower, "subjecting lenders to irreconcilable obligations and in so doing make it difficult or impossible for pension plans to persuade lenders to enter into arm's length, commercial loan transactions." *Id.* at 1575-76.

We also held that the law firm in *Useden* was not a fiduciary even though it had rendered both business and legal advice to the trust fund. We relied in part on federal regulations relating to ERISA that provide that an attorney who renders legal services to an employee benefit plan ordinarily will not become a plan fiduciary, where those services amount to no more than an attorney's "usual professional functions." 29 C.F.R. § 2509.75-5. The law firm in *Useden* had not departed from the usual functions of a law firm or otherwise effectively or realistically controlled the trust fund. *Id.* at 1577. Our decision in *Useden* also pointed out the compelling policy reasons for exercising caution in imposing fiduciary liability on attorneys:

> We think it imprudent and counter to the thrust of the ERISA scheme to hold that the commingling of legal advice with incidental business observations, especially when this advice is proffered to businesspersons of some sophistication, will automatically confer fiduciary status on attorneys and thus expose them to ERISA liability. . . . ERISA does not contemplate an allocation of liability that will deter consultants such as attorneys from assisting plans.

Id. at 1577-78.

The situation here is different from that in *Useden*, but in a way that makes that decision even more compelling authority for this case. The governing regulations, which we interpreted in *Useden*, involve the possibility of fiduciary status for attorneys arising in the context of the provision of professional services "*to an employee benefit plan.*" In this case, Klemick rendered professional services, not to the Trust Fund, but to Wilson, an individual beneficiary of the Trust Fund. Neither the statute itself nor the regulations address the possibility of fiduciary status for an attorney who renders professional services to a plan beneficiary, and we are aware of no other case in which an ERISA plan has even argued that ERISA imposes fiduciary liability on a plan beneficiary's personal injury lawyer.

In *Useden*, we cited with approval the Ninth Circuit's decision in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir.1988), where the court held that an attorney retained by a group of ERISA plans to collect delinquent contributions from member employers did not acquire fiduciary status. Using an argument similar to the one presented in this case—that the attorney's failure to collect sums owed to the trust fund constituted a dissipation of trust fund assets—the plans sought to impose fiduciary liability. The Ninth Circuit concluded that "[t]his argument proves far too much," because "[u]nder this rationale, anyone performing services for an ERISA plan—be it an attorney, an acountant, a security guard or a janitor—would be rendered a fiduciary insofar as he exercised some control over trust assets and through negligence or dishonesty jeopardized those assets." *Id.* at 870-71. The Ninth Circuit held that the attorney in *Nieto*, who had been employed by the plans and presumably given some measure of control over the trust assets he collected, was not a fiduciary.

We find the arguments against imposing fiduciary status on an attorney who represents a trust fund *bene-*

ficiary even more compelling than those against imposing fiduciary status on banks that enter financial transactions with and attorneys who render advice or services to an ERISA plan or trust fund. While Klemick did not assume the type of discretionary control over Trust Fund assets that the bank in *Useden* had, nonetheless, a "pre-existing framework of policies, practices and procedures" similar to that which relieved the bank in *Useden* from liability figures prominently in this case. *See Useden*, 947 F.2d at 1575. An attorney has an ethical obligation to his or her client that does not admit of competing allegiances. The following rule binds lawyers admitted to practice law in Florida:

> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest.
>
> * * * *

Florida Rules of Professional Conduct Rule 4-1.7(b). "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." *Id.* cmt. Klemick was retained by Wilson and owed a fiduciary duty to him alone. Just as imposing fiduciary liability on the bank in *Useden* would have subjected it to "inconsistent obligations," imposing fiduciary liability on Klemick would also create unacceptable conflicts of interest.

As a practical matter, we noted in *Useden*, 947 F.2d at 1575-76, 1578, that imposing fiduciary status willy-nilly would make banks and law firms extremely wary of ERISA plans as customers and clients. Imposing fiduciary status in cases such as this one would likely render it difficult for trust fund beneficiaries with personal injury claims to obtain counsel. That result would work to the detriment of ERISA trust funds: there would be a reduc-

tion in recovery from tortfeasors, and a concomitant reduction in the amounts available for subrogation payments. Moreover, a beneficiary who needed legal services in order to dispute the validity or enforceability of a subrogation agreement might be left out in the cold. The drafters of ERISA intended fiduciary liability to be broadly construed, *see Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir.1988); *Donovan v. Mercer*, 747 F.2d 304, 308 (5th Cir.1984), but even a broad construction has limits. In this case, the district court's judgment transgressed those limits.

The district court in this case put Klemick in the untenable position of owing conflicting fiduciary duties to both his client, Wilson, and to the Trust Fund. We do not think that Congress intended ERISA to extend that far. As one widely-cited authority has said:

> No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.

Matthew 6:24 (King James). A trust fund is not exactly "mammon," but an attorney's duty of loyalty to his client is very nearly sacred.

CONCLUSION

The order of summary judgment in favor of and the award of attorney's fees to the Trust Fund are REVERSED and the case REMANDED to the district court with instructions to enter judgment in favor of Klemick.

APPENDIX B

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-1002-CIV-SCOTT

MANNIE CHAPMAN, JIMMIE ERSKINE, DOROTHY REID, JAMES L. WOODALL, R.P. VINALL, and DIANE L. RAGONE, as Trustees of the Laborers Health and Welfare Trust Fund of South Florida

v.

HERMAN M. KLEMICK and HERMAN M. KLEMICK, P.A., a Florida Professional Association,

---

Oct. 30, 1990

Full Text of Opinion

SCOTT, District Judge.

This Cause is before the Court upon the parties' cross-motions for summary judgment, filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, and stipulation of facts. The plaintiffs, as Trustees of the Laborers Health and Welfare Trust Fund of South Florida, ("Trust Fund"), have instituted this action pursuant to Section 502(a)(3)(B) of the *Employee Retirement Income Security Act of 1974*, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3)(B). The Trust Fund has brought this action upon the following grounds: 1) breach of ERISA-imposed fiduciary duties; 2) imposition of a constructive trust; 3) aiding in the breach of duty by a par-

ticipant to the Trust Fund; and 4) tortious interference with contract. The defendants, Herman M. Klemick and Herman M. Klemick, P.A. ("Klemick"), allege that Attorney Herman M. Klemick is not a fiduciary for the purposes of the Trust Fund and that the Plaintiffs are not entitled to the imposition of a constructive trust. Having carefully reviewed the record and applicable legal authority, this Court now makes the following rulings.

1. LEGAL STANDARD

Pending are cross-motions for summary judgment which were submitted after the Court deferred ruling on a motion to dismiss. The parties have submitted a joint stipulation of facts. The Court will consider the motions under the appropriate standard.

Summary Judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P. 56(c). The burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406 (5th Cir. 1980). This burden may be discharged by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-moving party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *De Cuellar v. Brady*, 881 F.2d 1561 (11th Cir. 1989); *United of Omaha Life Ins. Co. v. Sun Life Ins. Co.*, 894 F.2d 1555 (11th Cir. 1990). Here there is no issue of material fact. The parties have filed a joint stipulated statement of facts. We believe these facts are dispositive of the issues.

II. FACTUAL BACKGROUND

The joint Stipulation of Facts filed with this Court indicate the following:

On or about August 20, 1987, a participant in the Trust Fund, Frank Wilson, Jr., ("Wilson"), suffered personal injuries when he was involved in a motor vehicle accident. As a result of the accident, Wilson incurred medical expenses in excess of $28,000.00. Subsequently, the Trust Fund reimbursed Wilson for his expenses. However, prior to releasing the funds, the Trust Fund requested that Wilson sign a subrogation agreement. Wilson called his attorney, Herman M. Klemick, and read the subrogation agreement to him.[1] After this consultation, Wilson signed the subrogation agreement. In pertinent part, the subrogation agreement called for the reimbursement of "all amounts recovered by suit, settlement, or otherwise from any party or insurance carrier. . ." to the Trust Fund.

On January 20, 1988, Wilson and Klemick received a check for $25,000.00 from State Farm Insurance Company which represented a settlement for the limits of the carrier's liability. Five days later, Klemick requested that the Trust Fund waive its right to subrogation of the settlement amount. The request was denied in a telephone conversation on March 17, 1988. Klemick indicated in that telephone conversation that he would never recommend that his client voluntarily turn over the settlement funds that he had recovered,[2] despite his knowledge of an agreement to the contrary. In addition, Klemick indicated that he had contrived a scenario by which, even if the Trust Fund sued his client and obtained a judgment against him for the amount of money recovered in the settlement, the Trust Fund would be frustrated in its at-

---

[1] Attorney Herman M. Klemick is the defendant in the present litigation.

[2] Stipulation of Facts at para. 18.

tempts to reclaim those sums. Klemick stated that if his client were to spend all the settlement monies prior to the enforcement of the judgment, the Trust Fund would not be able to recover any money because his client had no assets against which the Trust Fund could enforce the judgment.[3] Klemick also implied that if the Trust Fund were to obtain a garnishment and/or lien against his client, these attempts could also be frustrated by having his client declare bankruptcy.[4]

On March 21, 1988, five days after his conversation with the Trust Fund, Klemick had his client endorse the settlement check and tendered to him a check for $15,431.50. Klemick deposited the settlement check in the Herman M. Klemick, P.A. Trust Account. Klemick then proceeded to pay himself $8,333.00 as his attorney fee. Ten days later the Trustees filed a complaint and requested a temporary restraining order to enjoin Mr. Wilson from spending the settlement funds. However, in an emergency hearing before U.S. District Court Judge Lenore C. Nesbitt, Wilson informed the court that he had spent all of the settlement funds. On July 28, 1988, the Trust Fund obtained a judgment against Mr. Wilson for both the full amount of the settlement and an award of $21,659.00 in attorney's fees.

III. LEGAL ANALYSIS

This case involves the application of 29 U.S.C. § 1002 (21)(A) to an attorney who represents a beneficiary of an ERISA fund and who disposes of funds which properly became Trust Fund assets pursuant to a subrogation agreement signed by the beneficiary. There is no case authority directly addressing this issue.

In order to prevail on its motion for summary judgment, the Trust Fund must establish that Klemick is a

---

[3] Stipulation of Facts at para. 20(d).

[4] Stipulation of Facts at para. 20(e).

fiduciary for the purposes of ERISA. If Klemick is a fiduciary, the stipulated facts makes it clear that Klemick breached an ERISA-imposed duty to not dispose of the funds properly belonging to the Trust Fund in such a manner as which would injure the Fund and/or its beneficiaries. The issue presented is whether Klemick is a fiduciary.

ERISA explicitly defines a fiduciary in 29 U.S.C. § 1002(21)(A). "[A] person is a fiduciary with respect to a plan to the extent (i) he exercises *any* discretionary authority or discretionary control respecting management or disposition of its assets . . ." (emphasis added). The courts are in agreement that the term "fiduciary" is to be broadly construed. *See e.g., Brock v. Hendershott*, 840 F.2d 339 (6th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984). In determining whether Klemick is an ERISA fiduciary, the Court must examine whether Klemick had any discretionary control or authority over any Trust Fund assets. The plaintiff postulates that the settlement monies obtained from the third-party torfeasor who was responsible for the injuries sustained by Klemick's client became Trust Fund assets pursuant to the subrogation agreement signed by the client with full knowledge and approval of Klemick.[5] We agree.

Klemick was fully cognizant of the subrogation agreement signed by his client. In fact, his client signed the agreement only after consulting with Klemick. That agreement explicitly states that any funds Wilson obtained as a result of the events which led to the disbursement of benefits by the Trust Fund were obligated to be paid to the Trust Fund. The settlement monies paid to Klemick and Wilson became Trust Fund monies because they were "amounts recovered . . . as a result . . . of the events

---

[5] **Stipulation of Facts at para. 11-12.**

causing . . . the injuries." [6] As a result, when Klemick decided how to allocate the monies from the settlement check by:

> 1) paying Wilson approximately $15,400 from the Herman M. Klemick, P.A. Trust Account;
>
> 2) depositing Wilson's entire settlement check in his own Trust Fund Account;
>
> 3) paying himself and others from the funds obtained from Wilson's settlement check;

he exerted what is obviously "any . . . discretionary control respecting . . . disposition of [Trust Fund] assets". 29 U.S.C. § 1002(21)(A).

IV. DEFENDANT'S ARGUMENT

Klemick relies on *Schwab v. Davie*, 492 So.2d 708 (Fla. 4th DCA 1986) to suggest that he is entitled to recover his attorney fees and costs expended on behalf of his client. He fails to recognize, however, that under ERISA, which preempts state subrogation law, the Court must look to the explicit wording of the subrogation agreement to determine if attorney fees and costs are to be deducted from the amount owed to the ERISA fund pursuant to said agreement. "[W]here ERISA is silent on a particular subject, as it is on the issue of subrogation, resort may be had to federal common law. *See Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982); *M & R Invest. Co., Inc. v. Fitzsimmons*, 484 F. Supp. 1041, 1056 (D. Nev. 1980), *aff'd*, 685 F.2d 283 (9th Cir. 1982) . . . ERISA plans must be limited to their written provision and statutory constraints." *Zaragoza v. Metropolitan Life Insurance Co.*, Case Number 88-468-Civ (S.D. Fla. 1989) (*unpublished opinion*). "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be

---

[6] Subrogation agreement at Para. 2.

deemed to be an insurance company or other insurer . . . for purpose of any law of any State . . . 29 U.S.C. § 1144(b)(2)(B). As such, state case law which has held that an attorney has no duty to an insurer to turn over proceeds of settlements or lawsuits to the insurer pursuant to a subrogation clause in the insurance policy are inapplicable in the instant case. *See, Great American Insurance Company v. Spoden,* 316 N.W.2d 740 (Minn. 1982) and *Blue Cross of Massachusetts, Inc. v. Travaline,* 398 Mass. 582, 499 N.E. 2d 1195 (Mass. 1986).

In reaching this result, this Court does not maintain that Klemick should not receive compensation for his successful efforts expended in pursuing a settlement for the benefit of his client and the Trust Fund. The Court does not suggest that Wilson should not be compensated or that Klemick should not receive a fee. However, our legal system has devised procedures that provide parties the means through which they can prevent inequitable results. Klemick, as an officer of the court, had a duty to seek ethical alternative remedies. If, after negotiating with the Trust Fund, Klemick considered that the Trust Fund's refusal to waive the subrogation agreement would have had an inequitable result, he should have filed for a declaratory action asking for equitable distribution of the settlement funds. *See e.g., Travelers Ins. Co. v. Rodriguez,* 387 So.2d 341 (Fla. 1980); *Lititz Mut. Ins. Co. v. Bowdoin,* 365 So.2d 173 (1st DCA 1978); and *Government Emp. Ins. Co. v. Graff,* 327 So.2d 88 (1st DCA 1976). Instead, Klemick chose the most expedient course of conduct. We do not condone this behavior.

Additionally, Klemick argues that to be a fiduciary pursuant to 29 U.S.C. § 1002(21)(A) would create a conflict of interest between his duty to the Trust Fund and his duty as an attorney to his client. Although we are sensitive to Klemick's contention concerning a conflict of interest, we note that this is not the only situation where Federal law imposes obligations on an attorney

which could create an ostensible conflict of interest.[7] Such a conflict is over-ridden by the compelling policy of ERISA to protect the interests of the many as opposed to the greed of the one.

In enacting ERISA, Congress set out to protect participants in employee benefit plans "by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions . . ." 29 U.S.C. § 1001(b). "The primary purpose of [ERISA] is the protection of individual pension rights . . ." *reprinted in 3 Legislative History of the Employee Retirement Security Act of 1974* at 4639. It is in that light that the Court must interpret the definition of a fiduciary in 29 U.S.C. § 1002(21)(A). Accordingly, the Court finds Klemick to be a fiduciary under the explicit definition contained in ERISA.

The legislative history of ERISA states that "a fiduciary is one who occupies a position of confidence or trust." *Reprinted in 3 Legislative History of the Employee Retirement Security Act of 1974* at 4649. Klemick occupied such a position. The Trust Fund relied on Klemick to uphold the agreement his client had signed with his approval. "Fiduciaries [are] required to discharge their duties with respect to the fund 'solely in the interest of the participants and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims'." *Reprinted in 3 Legislative History of the Employee Retirement Security Act of 1974* at 4659. Applying the "pru-

---

[7] For example, the requirement that an attorney file an 8300 form upon receipt of $10,000 in cash from a client may present a potential conflict of interest. The attorney, however, is required to file this form by Federal mandate, despite conceivable attorney/client conflicts of interest.

dent man" standard to the facts stipulated to by both parties, there is no question that Klemick breached his fiduciary duty to the Trust Fund.

V. CONCLUSION

Based on the foregoing analysis, this Court holds Klemick to be a fiduciary under the terms of ERISA. As such, Klemick has breached his duty to the Trust Fund and is jointly and severably liable for an amount compatible with the principles of equitable distribution. This amount should be determined under the principles of equitable distribution. Having found the Defendant to be a fiduciary of an ERISA, we need not decide the remaining issues of the complaint.

Accordingly, it is ORDERED and ADJUDGED as follows:

(1) The petitioner, Trust Fund's, motion for summary judgment is GRANTED.

(2) The claimants, Herman M. Klemick and Herman M. Klemick, P.A.'s, motion for summary judgment is DENIED.

DONE and ORDERED in Chambers, at Miami, Florida, this 30 day of October, 1990.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-1002-CIV-RYSKAMP

MANNIE CHAPMAN, *et al.*,
Plaintiffs,

vs.

HERMAN M. KLEMICK, *et al.*,
Defendants.

[Filed April 2, 1992]

ORDER ON MOTION TO ALTER OR AMEND FINAL JUDGMENT

THIS CAUSE is before the Court on Plaintiffs' Motion to Alter or Amend Final Judgment. Fed. R. Civ. P. 59(e). Plaintiffs are trustees of a benefit plan ("Plan") established pursuant to the Employee Retirement Income Security Act ("ERISA"). Defendant Klemick is an attorney. Plaintiffs paid benefits to Defendants' client, Frank Wilson, who was a plan beneficiary and who was injured in a motorcycle accident. With Defendants' assistance, Wilson settled his claim against the other driver for $25,000. Plaintiffs sought to recover the settlement proceeds under a subrogation clause contained in the plan documents and a subrogation agreement reached between Wilson and the Plan.

The facts of this case are set forth in more detail in the Court's Memorandum Opinion entered October 30, 1990, and there is no need to repeat them here. In that Opinion, the Court granted Plaintiffs' motion for sum-

mary judgment and denied Defendants' summary judgment motion.

The Court subsequently applied the principle of equitable distribution, and accordingly entered final judgment in favor of Plaintiffs for $2,500. Plaintiffs contend that this was error and that the Court should have entered judgment in their favor for the full $25,000 received by Wilson, which they contend they are entitled to under the Plan's subrogation clause and the subrogation agreement signed by Wilson.

In its final judgment, the Court also deferred ruling on the issue whether Plaintiffs were entitled to attorneys fees and referred that question to the Magistrate Judge. Plaintiffs request that the final judgment be amended to award them their attorneys fees.

The Court in its Memorandum Opinion correctly recognized that ERISA preempts state law concerning this matter. *See* Mem. Opin. 7 (Oct. 30, 1990); *see also FMC Corp. v. Holliday*, 498 U.S. ——, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) (ERISA preempts state anti-subrogation statute). The Court nonetheless concluded that the subrogation agreement permitted application of the principle of equitable distribution. The question is whether the Court's interpretation of the subrogation agreement was correct.

The subrogation clause provides in relevant part that:

> [I]f a Covered Person is entitled to receive Benefits from the Plan for injuries caused by a third party, the Plan has a right through subrogation to repayment of amounts paid by the Plan from:
>
> > 2. The Covered Person from any payments made to Covered Person by any party or his Insurance Carrier (including the Covered Person's Insurance Carrier).

Complaint Ex. A. Pursuant to the subrogation clause, Wilson and the Plan entered into a subrogation agreement. That agreement provides in relevant part that Wilson must

> pay over to the Plan, to the extent of the amount of benefits paid by the Plan, *all amounts* recovered by suit, settlement, or otherwise from any party or insurance carrier (including [Wilson's] insurance carrier) as a result, directly or indirectly, of the events causing or contributing to the injuries sustained as described above.

Complaint Ex. B (emphasis added).

Nothing in the subrogation agreement provides for application of the principle of equitable distribution. Defendants point to no ambiguity in the agreement which would permit the Court to apply that principle and the Court finds none. Indeed, the agreement could not be more clear: all amounts recovered by Wilson were required to be returned to the Plan, up to the amount of the benefits paid by the Plan to Wilson.

The Court concludes that it erred in its previous interpretation of the subrogation agreement. Plaintiffs are entitled to the full $25,000 received by Wilson in settlement of his claim against the other driver.

The Court's previous misinterpretation of the subrogation agreement does not provide grounds, however, for amending that portion of the final judgment which deferred ruling on the attorneys fees issue and referred that question to the Magistrate Judge. Consequently, to the extent that the motion seeks amendment of the final judgment's refusal to award attorneys fees, it is denied.

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the motion to amend or alter the Final Judgment is GRANTED in part and DENIED in part. The Final Judgment is accord-

ingly AMENDED and shall be ENTERED in favor of Plaintiffs in the amount of $25,000.

DONE AND ORDERED in chambers at the United States District Court, Miami, Florida, this 1st day of April, 1992.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Judge

counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 92-7082 MRP

TEAMSTERS INDUSTRIAL SECURITY FUND,
Plaintiff,

v.

MONICO SALCADO; *et al.*,
Defendants.

[Filed Aug. 26, 1993]

MEMORANDUM OF DECISION

BACKGROUND

Plaintiff Teamsters Industrial Security Fund (the "Fund") is an employee welfare benefit plan that provides benefits to participants and their dependents for medical expenses. As a condition to the payment of benefits to a participant where a third party may be liable, the Fund requires the participant and dependent to execute an assignment to the Fund of any sums obtained from the third party, up to the amount of benefits paid by the Fund.

Defendant Monico Salgado is a participant in the Fund. His spouse and Fund beneficiary, Fabiola Salgado, was injured in an automobile accident involving a third party and sought medical treatment. The Fund secured a Reimbursement Agreement from the Salgados and paid

$4,569.80 in benefits for Fabiola Salgado's medical treatment.

Defendants Padnick and his firm, Padnick & Cuscino (the "Firm"), represented Fabiola Salgado in her personal injury action against the third party. In May, 1991 Padnick and the Firm received a settlement check for $45,000.00 and a Release of All Claims from the defendants in that action. According to Padnick, the Salgados refused to execute or endorse these documents for several months, during which they refused to allow the Firm to negotiate reimbursement to the Fund and threatened Padnick. On September 19, 1991, the Firm advanced Fabiola Salgado $26,888.70 from the Firm's Clients' Trust Account, representing $45,000 minus medical bills not paid by the Fund and legal fees of $15,000. The Salgados then executed the settlement documents. Padnick claims that the Firm was forced to advance the Salgados the funds in order to induce them to execute the documents, and that the Firm did so in response to a threat by defense counsel in the personal injury action to file a motion for sanctions if the documents were not executed by September 15, 1991.

The Fund filed this action to collect the $4,569.80 it was due under the Reimbursement Agreement. On June 29, 1993, the Fund filed a motion for summary judgment against Padnick and the Firm on the ground that these defendants breached their fiduicary duty under the Employee Retirement Income Security Act of 1974 ("ERISA") and converted Fund assets. The Court took the motion under submission on August 9, 1993, and now grants summary judgment.

ANALYSIS

I. *Breach of Fiduciary Duty*

Plaintiff argues that Padnick and the Firm were fiduciaries of the Fund. Plaintiff is correct.

Plaintiff brought this action under Section 409(a) of ERISA, 29 U.S.C. § 1109(a), to recover Fund assets. Plaintiff's first claim is against Padnick and the Firm as fiduciaries of the Fund. Section 3(21)(A) of ERISA provides that "a person is a fiduciary with respect to a plan to the extent (i) he . . . exercises any authority or control respecting management or disposition of its assets . . . ." 29 U.S.C. § 1002(21)(A).

Under *Chapman v. Klemick*, 750 F. Supp. 520 (S.D. Fla. 1990), Padnick and the Firm were fiduciaries of the Fund. In *Chapman*, as here, trustees of an ERISA fund sued the attorney who represented a fund beneficiary in a personal injury action against a third party. Pursuant to a subrogation agreement signed by the beneficiary, the trust fund sought to recover money it had paid the beneficiary for medical expenses which were later recovered in settlement of the personal injury action. After requesting unsuccessfully that the trust fund waive its right to subrogation of the settlement amount, the attorney had his client endorse the settlement check and tendered to him a check for the settlement amount minus an attorney fee. The attorney refused to recommend to his client that he honor the subrogation agreement, and encouraged his client to spend the money so that the fund would not be able to recover it. The court held that the attorney was a fiduciary of the fund, and stated:

> The courts are in agreement that the term "fiduciary" is to be broadly construed. *See, e.g., Brock v. Hendershott*, 850 F.2d 339 (6th Cir. 1988); *Donovan v. Mercer*, 747 F.2d 304 (5th Cir. 1984). In determining whether [the attorney] is an ERISA fiduciary, the Court must examine whether [the attorney] had any discretionary control or authority over any Trust Fund assets. The plaintiff postulates that the settlement monies obtained from the third-party tortfeasor who was responsible for the injuries

> sustained by [the attorney's] client became Trust Fund assets pursuant to the subrogation agreement signed by the client with full knowledge and approval of [the attorney]. We agree.

Chapman, 750 F. Supp. at 522.

Here, Padnick and the Firm had discretionary control over the Fund's assets when the Salgados endorsed the settlement check and Padnick disbursed it to them and to himself for attorney fees. The fact that Padnick did this purportedly under pressure from the Salgados does not prevent him and the Firm from being fiduciaries under ERISA; Padnick and the Firm cite no authority for the proposition that an attorney is relieved of his obligations because a client insists that the attorney violate them.

As fiduciaries of the Fund, Padnick and the Firm were obligated to act solely in the interests of the participants and beneficiaries of the Fund in handling Fund assets. *See* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1); *Acosta v. Pacific Enterprises*, 950 F.2d 611, 618 (9th Cir. 1991).

In *Chapman*, the court held that the attorney's distribution of the settlement proceeds without satisfying the subrogation agreement between the trust fund and the client breached the attorney's fiduciary duty. *Chapman*, 750 F. Supp. at 524. Here, Padnick and the Firm clearly breached their fiduciary duty when Padnick disbursed the settlement funds without reimbursing the Fund. Thus, Padnick and the Firm are jointly and severally liable, *see Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987), and summary judgment is appropriate as to plaintiff's First Claim for Relief.

The Fund also requests attorneys' fees under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), which gives the district court discretion to award attorneys' fees to a party in an ERISA action. In exercising its discretion under this section, the court should consider

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

McConnell v. MEBA Medical & Benefits Plan, 778 F.2d 521, 525 (9th Cir. 1985) (citing *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980)). Given the special circumstances of this case—that the Salgados threatened Padnick and demanded that he not reimburse the Fund, that Padnick sought to avoid sanctions from opposing counsel in the personal injury action, and that Padnick was suffering from psychological problems, *see* Padnick Decl., attorneys' fees will not be awarded.

The Court also has discretion to award punitive damages against Padnick and the Firm for violation of their fiduciary duties. *See Ampere Automotive Corp. v. Employee Benefit Plans*, 1993 WL 13406 (N.D. Ill. 1993); *Cox v. Eichler*, 765 F. Supp. 601, 610-11 (N.D. Cal. 1991). Again, given the circumstances of this case, punitive damages will not be awarded.

II. *Conversion*

This Court has supplemental jurisdiction of plaintiff's claim for conversion of Fund assets as a state law claim arising from the same nucleus of operative fact as plaintiff's ERISA claim. *See Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).

Plaintiff is correct that Padnick and the Firm are liable for conversion for failing to return Fund assets to the Fund upon receipt of settlement proceeds. *See Johnstone*

v. State Bar, 64 Cal. 2d 153, 155-56, 49 Cal. Rptr. 97 (1966) ("When an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party. Thus the funds in his possession are impressed with a trust, and his conversion of such funds is a breach of the trust."); *Haigler v. Donnelly,* 18 Cal. 2d 674, 681, 117 F.2d 331 (1941) ("When an agent is required to turn over to his principal a definite sum received by him on his principal's account, the remedy of conversion is proper."); *Hiller v. Rau,* 216 Cal. App. 2d 68, 67-66, 30 Cal. Rptr. 612 (1963) (attorney who disburses funds to client in violation of known rights of another is guilty of conversion).

The fact that Padnick gave the Salgados a check for $26,888.70—from the Firm's clients' trust account—before depositing the settlement proceeds does not relieve him of his obligation to reimburse the Fund under the Reimbursement agreement. *See In re Marriage of Wagoner,* 176 Cal. App. 3d 936, 941, 222 Cal. Rptr. 479 (1986) (attorney held liable for monies disbursed by client and himself in violation of stipulated order providing for division of community property). The Fund's lien on a portion of the settlement funds attached when the Salgados endorsed the settlement check and signed the release. *See* Cal. Civ. Code § 2883.

Furthermore, Padnick and the Firm are liable for conversion despite the Salgados' threats and demands. "Because the tort of conversion is a species of strict liability, defendant's good faith, ignorance, mistake or motive is irrelevant and does not constitute a defense." *Enterprise Leasing v. Shugart Corp.*, 231 Cal. App. 3d 737, 747-48, 282 Cal. Rptr. 621 (1991).

The Fund is entitled to summary judgment on its Third Claim for Relief and to recover the value of the converted assets. Since the Fund has recovered $81.00 from Monico Salgado by withholding payments for benefits, the Fund is entitled to recover $4,488.80 plus pre-

judgment interest. *See* Cal. Civ. Code § 3288; *Mutuelles Union v. Kroll & Linstrom*, 957 F.2d 707, 714 (9th Cir. 1993).

Plaintiff also requests punitive damages on the ground that the conversion was committed with malice, fraud, or oppression. *Haigler*, 18 Cal. 2d at 681. Cal. Civ. Code § 3294(c)(1) defines malice for purposes of awarding punitive damages as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights . . . of others." Given the unusual circumstances of this case, the Court finds an award of punitive damages inappropriate.

CONCLUSION

Padnick and the Firm are jointly and severally liable for breach of their fiduciary to the Fund and conversion for their failure to reimburse the Fund before disbursing settlement funds to the Salgados. Summary judgment is granted as to plaintiff's First and Third Claims for Relief against Padnick and the Firm. Plaintiff's requests for attorneys' fees and punitive damages are denied.

DATED: August 26, 1993

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District Judge

APPENDIX E

ERISA Section 3(1)

Sec. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

ERISA Section 3(21)(A)

Sec. 3. For purposes of this title:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B).

ERISA Section 409(a)

LIABILITY FOR BREACH OF FIDUCIARY DUTY

Sec. 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

ERISA Section 502(e)(1) and (f)

Sec. 502(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

* * * *

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

29 CFR § 2509.75-5 (1986)

Sec. 2509.75-5—Questions and answers relating to fiduciary responsibility.

On June 25, 1975, the Department of Labor issued an interpretive bulletin, ERISA IB 75-5, containing questions and answers relating to certain aspects of the recently enacted Employee Retirement Income Security Act of 1974 (the "Act").

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretative bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

Index

Key To Question Prefixes

D—Refers to Definitions.

FR—Refers to Fiduciary Responsibility.

Section No.	Question No.
3(21)	D-1.
3(38)	FR-6, FR-7.
402(a)	FR-1, FR-2, FR-3.

402(b)(1)	FR-4, FR-5.
402(c)(3)	FR-6, FR-7.
404(a)	FR-10.
405(a)(3)	FR-10.
405(b)(1)(A)	FR-10.
406(a)	FR-9.
409(a)	FR-10.
412(a)	FR-8, FR-9.

D-1 Q: Is an attorney, accountant, actuary or consultant who renders legal, accounting, actuarial or consulting services to an employee benefit plan (other than an investment adviser to the plan) a fiduciary to the plan solely by virtue of the rendering of such services, absent a showing that such consultant (a) exercises discretionary authority or discretionary control respecting the management of the plan, (b) exercises authority or control respecting management or disposition of the plan's assets, (c) renders investment advice for a fee, direct or indirect, with respect to the assets of the plan, or has any authority or responsibility to do so, or (d) has any discretionary authority or discretionary responsibility in the administration of the plan?

A: No. However, while attorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries, if the factual situation in a particular case falls within one of the categories described in clauses (a) through (d) of this question, such persons would be considered to be fiduciaries within the meaning of section 3(21) of the Act. The Internal Revenue Service notes that such persons would also be considered to be fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

FR-1 Q: If an instrument establishing an employee benefit plan provides that the plan committee shall control and manage the operation and administration of the plan and specifies who shall constitute the plan committee (either by position or by naming individuals to the committee), does such provision adequately satisfy the requirement in section 402(a) that a "named fiduciary" be provided for in a plan instrument?

A: Yes. While the better practice would be to state explicitly that the plan committee is the "named fiduciary" for purposes of the Act, clear identification of one or more persons, by name or title, combined with a statement that such person or persons have authority to control and manage the operation and administration of the plan, satisfies the "named fiduciary" requirement of section 402(a). The purpose of this requirement is to enable employees and other interested persons to ascertain who is responsible for operating the plan. The instrument in the above example, which provides that "the plan committee shall control and manage the operation and administration of the plan", and specifies, by name or position, who shall constitute the committee, fulfills this requirement.

FR-2 Q: In a union negotiated employee benefit plan, the instrument establishing the plan provides that a joint board on which employees and employers are equally represented shall control and manage the operation and administration of the plan. Does this provision adequately satisfy the requirement in section 402(a) that a "named fiduciary" be provided for in a plan instrument?

A: Yes, for the reasons stated in response to question FR-1. The joint board is clearly identified as the entity which has authority to control and manage the operation and administration of the plan, and the persons designated to be members of such joint board would be named fiduciaries under section 402(a).

FR-3 Q: May an employee benefit plan covering employees of a corporation designate the corporation as the "named fiduciary" for purposes of section 402(a)(1) of the Act?

A: Yes, it may. Section 402(a)(2) of the Act states that a "named fiduciary" is a fiduciary either named in the plan instrument or designated according to a procedure set forth in the plan instrument. A fiduciary is a "person" falling within the definition of fiduciary set forth in section 3(21)(A) of the Act. A "person" may be a corporation under the definition of person contained in section 3(9) of the Act. While such designation satisfies the requirement of enabling employees and other interested persons to ascertain the person or persons responsible for operating the plan, a plan instrument which designates a corporation as "named fiduciary" should provide for designation by the corporation of specified individuals or other persons to carry out specified fiduciary responsibilities under the plan, in accordance with section 405(c)(1)(B) of the Act.

FR-4 Q: A defined benefit pension plan's procedure for establishing and carrying out a funding policy provides that the plan's trustees shall, at a meeting duly called for the purpose, establish a funding policy and method which satisfies the requirements of Part 3 of Title 1 of the Act, and shall meet annually at a stated time of the year to review such funding policy and method. It further provides that all actions taken with respect to such funding policy and method and the reasons therefor shall be recorded in the minutes of the trustees' meetings. Does this procedure comply with section 402(b)(1) of the Act?

A: Yes. The above procedure specifies who is to establish the funding policy and method for the plan, and provides for a written record of the actions taken with respect to such funding policy and method, including the reasons for such actions. The purpose of the funding

policy requirement set forth in section 402(b)(1) is to enable plan participants and beneficiaries to ascertain that the plan has a funding policy that meets the requirements of Part 3 of Title I of the Act. The procedure set forth above meets that requirement.

FR-5 Q: Must a welfare plan in which the benefits are paid out of the general assets of the employer have a procedure for establishing and carrying out a funding policy set forth in the plan instrument?

A: No. Section 402(b)(1) requires that the plan provide for such a procedure "consistent with the objectives of the plan" and requirements of Title I of the Act. In situations in which a plan is unfunded and Title I of the Act does not require the plan to be funded, there is no need to provide for such a procedure. If the welfare plan were funded, a procedure consistent with the objectives of the plan would have to be established.

FR-6 Q: May an investment adviser which is neither a bank nor an insurance company, and which is not registered under the Investment Advisers Act of 1940 in reliance upon an exemption from registration provided in that Act, be appointed an investment manager under section 402(c)(3) of the Act?

A: No. The only persons who may be appointed an investment manager under section 402(c)(3) of the Act are persons who meet the requirements of section 3(38) of the Act—namely, banks (as defined in the Investment Advisers Act of 1940), insurance companies qualified under the laws of more than one state to manage, acquire and dispose of plan assets, or persons registered as investment advisers under the Investment Advisers Act of 1940.

FR-7 Q: May an invetment adviser that has a registration application pending under the Investment Advisers Act of 1940 function as an investment manager under the Act prior to the effective date of registration under the Investment Advisers Act?

A: No, for the reasons stated in the answer to FR-6 above.

FR-8 Q: Under the temporary bonding regulation set forth in 29 CFR 2550.412-1, must a person who renders investment advice to a plan for a fee or other compensation, direct or indirect, but who does not exercise or have the right to exercise discretionary authority with respect to the assets of the plan, be bonded solely by reason of the provision of such investment advice?

A: No. A person who renders investment advice, but who does not exercise or have the right to exercise discretionary authority with respect to plan assets, is not required to be bonded solely by reason of the provision of such investment advice. Such a person is not considered to be "handling" funds within the meaning of the temporary bonding regulation set forth in 29 CFR 2550.-412-1, which incorporates by reference 29 CFR 464.7. For purposes of the temporary bonding regulation, only those fiduciaries who handle funds must be bonded. If, in addition to the rendering of investment advice, such person performs any additional function which constitutes the handling of plan funds under 29 CFR 464.7, the person would have to be bonded.

FR-9 Q: May an employee benefit plan purchase a bond covering plan officials?

A: Yes. The bonding requirement, which applies, with certain exceptions, to every plan official under section 412(a) of the Act, is for the protection of the plan and does not benefit any plan official or relieve any plan official of any obligation to the plan. The purchase of such bond by a plan will not, therefore, be considered to be in contravention of sections 406(a) or (b) of the Act.

FR-10 Q: An employee benefit plan is considering the construction of a building to house the administration of the plan. One trustee has proposed that the building

be constructed on a cost plus basis by a particular contractor without competitive bidding. When the trustee was questioned by another trustee as to the basis of choice of the contractor, the impact of the building on the plan's administrative costs, whether a cost plus contract would yield a better price to the plan than a fixed price basis, and why a negotiated contract would be better than letting the contract for competitive bidding, no satisfactory answers were provided. Several of the trustees have argued that letting such a contract wou'd be a violation of their general fiduciary responsibilities. Despite their arguments, a majority of the trustees appear to be ready to vote to construct the building as proposed.

What should the minority trustees do to protect themselves from liability under section 409(a) of the Act and section 405(b)(1)(A) of the Act?

A: Here, where a majority of trustees appear ready to take action which would clearly be contrary to the prudence requirement of section 404(a)(1)(B) of the Act, it is incumbent on the minority trustees to take all reasonable and legal steps to prevent the action. Such steps might include preparations to obtain an injunction from a Federal District court under section 502(a)(3) of the Act, to notify the Labor Department, or to publicize the vote if the decision is to proceed as proposed. If, having taken all reasonable and legal steps to prevent the imprudent action, the minority trustees have not succeeded, they will not incur liability for the action of the majority. Mere resignation, however, without taking steps to prevent the imprudent action, will not suffice to avoid liability for the minority trustees once they have knowledge that the imprudent action is under consideration.

More generally, trustees should take great care to document adequately all meetings where actions are taken with respect to management and control of plan assets. Written minutes of all actions taken should be kept describing

the action taken, and stating how each trustee voted on each matter. If, as in the case above, trustees object to a proposed action on the grounds of possible violation of the fiduciary responsibility provisions of the Act, the trustees so objecting should insist that their objections and the responses to such objections be included in the record of the meeting. It should be noted that, where a trustee believes that a cotrustee has already committed a breach, resignation by the trustee as a protest against such breach will not generally be considered sufficient to discharge the trustee's positive duty under section 405(a)(3) to make reasonable efforts under the circumstances to remedy the breach.

Promulgated: 40 Fed. Reg. 31599 (7/28/75).

Amended: 41 Fed. Reg. 1906 (1/13/76).

Rule 4-1.7. Conflict of interest; general rule

* * * *

(b) **Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

* * * *

Rule 4-1.15. Safekeeping property

* * * *

(c) Disputed Ownership of Funds. When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

* * * *